

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JOSEPH GURWIN</b>	:	<b>ORDER</b>
	:	<b>DTA NO. 822810</b>
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2003.	:	

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Petitioner, Joseph Gurwin, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2003.

On January 26, 2009, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On February 23, 2009, petitioner, appearing by Joseph N. Endres, Esq., submitted documentation in opposition to dismissal. On March 6, 2009, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), having been granted an extension of time, submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced March 6, 2009. After due consideration of the documents submitted, Timothy Alston, Administrative Law Judge, renders the following order.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to consider a petition filed by petitioner to contest a Notice of Deficiency dated May 12, 2008.

***FINDINGS OF FACT***

1. On January 15, 2009, petitioner, Joseph Gurwin, filed a petition with the Division of Tax Appeals in protest of a Notice of Deficiency dated May 12, 2008. The notice bears assessment identification number L-030010587-7 and is addressed to petitioner as follows:

Gurwin - Joseph  
150 - N Ocean Blvd  
Palm Beach, FL 33480-3964.

2. A corresponding "Mailing Cover Sheet" (*see* Finding of Fact 11) bears petitioner's name and address as noted above and certified mail control number 7104 1002 9730 0723 0673.

3. Petitioner did not file a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services with regard to the May 12, 2008 Notice of Deficiency.

4. On January 26, 2009, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent indicates that the relevant Notice of Deficiency appeared to have been issued on May 12, 2008, but that the petition was not filed until January 15, 2009, or 241 days later

5. The subject May 12, 2008 Notice of Deficiency asserts additional personal income tax due from petitioner, plus penalty and interest, for the year 2003.

6. Petitioner's personal income tax liability for the years 2003 through 2005 was audited by the Division of Taxation (Division). Petitioner executed a power of attorney dated January 23, 2007 appointing attorneys Paul R. Comeau, Timothy P. Noonan and Joseph N. Endres, all of Hodgson Russ, LLP, to represent him in the audit. The power of attorney was filed with the Division and lists petitioner's address as:

150 N. Ocean Blvd. #403  
Palm Beach, Florida 33480-3935.

7. In connection with its audit, the Division transmitted to Mr. Comeau a Consent to Field Audit Adjustment dated May 21, 2008. The consent sets forth proposed audit adjustments to petitioner's income tax liability for each of the years 2003, 2004 and 2005. A cover letter, also dated May 21, 2008 and addressed to Mr. Comeau, states in part:

If you disagree with the findings and would like the opportunity to discuss them in greater detail, please contact the auditor by 06/20/2008. At this time you may submit evidence to substantiate your position. . . .

Not responding to this letter will result in the issuance of a statutory notice of deficiency.

8. The May 21, 2008 Consent to Field Audit Adjustment lists petitioner's address as follows:

Gurwin - Joseph  
150 N Ocean Blvd 403  
Palm Beach, FL 33480-3935.

9. The May 21, 2008 consent cover letter is addressed to Mr. Comeau as follows:

Mr. Paul R. Comeau  
Hodgson Russ, LLP  
140 Pearl Street  
Suite 100  
Buffalo, NY 14202.

10. Notices of deficiency, such as the one at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System (CARTS) Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record (CMR). The CMR lists those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number.

11. Each computer-generated notice of deficiency is pre-dated with its anticipated mailing date and each is assigned a certified mail control number. This number is recorded on the CMR under the heading "Certified No." The certified number for each notice appears on a separate

one-page “Mailing Cover Sheet” that is generated by CARTS for each notice of deficiency. The CMR lists a printing (or run) date and time in its upper left corner which is generally about 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The run date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices.

12. In this case, the CMR pertaining to the Notice of Deficiency dated May 12, 2008 lists a run date of “20081211701” (meaning year 2008, day 121, time 1701, or April 30, 2008, 5:01 P.M.). In addition, on the first and last pages of this CMR, the date “5/12/08” has been handwritten above the computer-printed run date.

13. After notices of deficiency, along with accompanying mail cover sheets and appropriate enclosures, are placed in window envelopes by Division personnel, the envelopes are then placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail.” A staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of up to 30 pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or the employee’s initials (or signature) or both to the CMR.

14. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

15. The CMR related to the subject Notice of Deficiency dated May 12, 2008 is a 713-page, computer-generated document entitled "Certified Record for Presort Mail - Assessments Receivable." This CMR purports to list 7,841 certified control numbers, each of which is assigned to an item of mail listed thereon. That is, corresponding to each listed certified control number is a notice identification number (under the heading "Reference No."), the name and address of the addressee, and postage and fee amounts.

16. The Division submitted copies of six selected pages from the CMR. Specifically, the first and last pages, the two pages containing information related to petitioner and his representative, and two pages showing deletions from the list.

17. Regarding the deletions, there are two such items from the list of 7,841 computer-printed certified control numbers. These "pulled" items are shown on pages 190 and 548 of the CMR by a line drawn through the relevant certified control numbers and corresponding information. The pulled items are unrelated to the Notice of Deficiency at issue in this matter. Consistent with these deletions, the computer-printed "total pieces" entry of "7,841" on page 713 of the CMR has been crossed out and "7,839" has been handwritten next to the entry "total pieces received at post office."

18. Information regarding the Notice of Deficiency dated May 12, 2008 and addressed to petitioner is contained on page 697 of the CMR. Specifically, corresponding to the certified control number 7104 1002 9730 0723 0673 is reference number L 030010587 along with

petitioner's name and an address, which is identical to that listed on the May 12, 2008 Notice of Deficiency and on the related Mail Cover Sheet (*see* Findings of Fact 1 and 2).

19. Information regarding a copy of the Notice of Deficiency dated May 12, 2008 and addressed to "Hodgson Russ LLP" is contained on page 634 of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0722 3804 is reference number L 030010587 and the following address:

Hodgson Russ LLP  
140 Pearl Street  
Suite 100  
Buffalo, NY 14202.

20. All six pages of the CMR which are in evidence bear the postmark of the Albany, New York General Mail Facility of the U.S. Postal Service dated May 12, 2008.

21. At the bottom of the last page of the CMR (page 713) there is a stamp which states "Post Office - Hand write total # of pieces and initial." Next to this stamp the number "7,839" has been handwritten. The initials of a postal service employee appear next to the handwritten "7,839."

22. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the handwritten "7,839" as the "total # of pieces " figure indicate that 7,839 pieces of mail listed on this CMR were received at the post office.

23. The facts set forth above in Findings of Fact 10 through 22 were established through affidavits of Patricia Finn Sears and James Steven VanDerZee. Ms. Sears is employed as a supervisor in the Division's CARTS Control Unit. Ms. Sears's duties include supervising the processing of notices of deficiency. Mr. VanDerZee is employed as a mail and supply supervisor

in the Division's Registry Unit. Mr. VanDerZee's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

24. The fact that the Postal Service employee wrote (*see* Finding of Fact 21) the total number of pieces received on the CMR to indicate that this was the number of pieces received at the post office was established through the affidavit of Mr. VanDerZee. Mr. VanDerZee's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

25. An enclosure with the copy of the subject notice of deficiency addressed to Hodgson Russ LLP advises, in part, that the Division is "forwarding the enclosed document to you because our records indicate that you have power of attorney to act as legal representative for Gurwin - Joseph." The enclosure also advises that a copy of the notice has been forwarded to petitioner. Similarly, an enclosure with the notice addressed to petitioner advises that a copy of the notice has been forwarded to Hodgson Russ LLP.

26. The Division made requests to the U.S. Postal Service for delivery information on the subject notices of deficiency addressed to petitioner and Hodgson Russ LLP. With respect to the notice addressed to petitioner, the Postal Service advised that an article of mail bearing certified number 7104 1002 9730 0723 0673 was delivered on May 15, 2008 at 2:02 P.M. to "150 N Ocean" in Palm Beach FL 33480. The scanned image of the recipient's printed name and signature, provided in response to the Division's request, while not legible, is clearly not that of petitioner as the first letter of the first name is "C" and the first letter of the last name is "V." With respect to the notice addressed to Hodgson Russ LLP, the Postal Service advised that an article of mail bearing certified number 7104 1002 9730 0722 3804 was delivered to 140 Pearl

St., Buffalo, NY 14202 on May 14, 2008 at 9:55 A.M. The scanned image of the recipient's name appears to be "Meaghan O'Hara."

27. Petitioner's 2003 New York nonresident return (Form IT-203) filed May 5, 2004 was the last New York return filed by petitioner. The 2003 return reports petitioner's mailing address as 150 North Ocean Blvd, Apartment number 403, Palm Beach FL 33480-3935.

### ***CONCLUSIONS OF LAW***

A. There is a 90-day statutory time limit for filing a petition following the issuance of a Notice of Deficiency (Tax Law § 681[b]; § 689[b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

B. Where, as here, the timeliness of a petition for a hearing is at issue the Division has the burden to establish that it mailed the subject Notice of Deficiency to the taxpayer at his last known address pursuant to Tax Law § 681(a) (*Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).<sup>1</sup> Where a notice of deficiency has been properly mailed, Tax Law § 681(a) does not require actual receipt by the taxpayer (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

C. A taxpayer's last known address is "the address given in the last return filed by him, unless subsequently to the filing of such return the taxpayer shall have notified the [Division] of

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<sup>1</sup>As is well established, the Division's burden includes proof of the date and fact of mailing (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden by showing a standard mailing procedure and that such procedure was following in this instance (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Here, through the affidavits of Patricia Finn Sears and James Steven VanDerZee the Division has established a standard mailing procedure, and through the same affidavits, the CMR and the Postal Service delivery information has shown that the subject notices were mailed as claimed on May 12, 2008. The only question is whether the notice to petitioner was mailed to his last known address as required under Tax Law § 681(a) and whether the notice to petitioner's representatives was adequate.



a change in address”( Tax Law § 691[b]). In this case, petitioner’s 2003 nonresident return was the last New York return filed by him and was, therefore, his last known address.

D. As compared to petitioner’s last known address, the address on the subject Notice of Deficiency contains two errors. Specifically, the 2003 return includes apartment number 403 as part of petitioner’s address, while the notice does not include any apartment number. Also, the return reports petitioner’s zip code as “33480-3935” while the notice lists petitioner’s zip code as “33480-3964” (emphasis added).

E. If either of the errors on the address on the notice of deficiency is “consequential,” then it must be concluded that the Division failed to mail the subject notice to petitioner at his last known address as required under Tax Law § 681(a) (*Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).

F. As to the zip code discrepancy, the use of an incorrect zip code is an inconsequential error and thus does not result in a failure to comply with the last known address requirement of Tax Law § 681(a) (*Matter of Karolight, Ltd.*, Tax Appeals Tribunal, July 30, 1992).

G. The failure to include the apartment number on the notice, however, is a consequential error. The record shows that the Division mailed the notice to 150 N Ocean Boulevard, Palm Beach, Florida, and that the article was delivered to that address. The evidence does not show, however, that the notice was delivered to the correct apartment at 150 N Ocean Boulevard. The postal service delivery records do not indicate an apartment number and the signature contained in those records is clearly not that of petitioner. Moreover, there is no evidence of the Postal Service’s general procedure where no apartment number is included on an address and there is no evidence of the Postal Service’s delivery procedure in this particular instance. (*Cf., Clark v. Commr.*, 65 TCM 2150[1993] [Tax Court held that the omission of an apartment number was

“an inconsequential error” where a Postal Service employee testified as to the procedures followed in the delivery of the subject notice].) Furthermore, the Domestic Mail Manual requires an apartment number, where applicable, as an element of an address.<sup>2</sup> While it may be likely that the Postal Service would seek to ascertain the correct apartment number and thereby effect proper delivery, such likelihood is insufficient to countenance the Division’s error in this case and thereby deem such error inconsequential for purposes of Tax Law § 681(a).

H. The Division also failed to properly serve a copy of the subject notice of deficiency on petitioner’s representatives. Although not mandated by statute, case law has established that the 90-day period for filing a petition is tolled if the taxpayer’s representative is not served with the statutory notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008). Here, a copy of the notice was mailed and delivered to the representatives’ law firm, but, in an obvious error, was not addressed to any of the three attorneys listed on the power of attorney filed with the Division. The Tax Appeals Tribunal has found that the failure to include a recipient’s name is a consequential error with respect to proper mailing under Tax Law § 681(a) (*Matter of Combemale*). Moreover, according to the Domestic Mail Manual, the intended recipient’s name is a required element of an address (*see* Domestic Mail Manual 300 [Mailing Standards of the United States Postal Service], 602 [Addressing], 1.3 [Address Elements]).

I. Having concluded that the subject Notice of Deficiency was incorrectly addressed to both petitioner and his representatives, resolution of the issues of the timeliness of the petition and the validity of the notice depends upon if and when petitioner actually received the notice and when petitioner’s representatives received a copy of the notice. “As long as a notice of

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<sup>2</sup> Specifically Domestic Mail Manual 300 (Mailing Standards of the United States Postal Service), 602 (Addressing), 1.3 (Address Elements) includes as a required element of an address “Street and Number. (Include the apartment number . . . as applicable.)”

deficiency is actually received by the taxpayer in sufficient time to file a petition for redetermination, the notice is valid despite an error in the taxpayer's mailing address" (*Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228, 229 [3d Dept 1992], *lv denied* 79 NY2d 759, 584 NYS2d 447 [1992]). If an incorrectly addressed notice is not actually received by the taxpayer, the notice is invalid (*Matter of Combemale*). Additionally, as noted previously, the limitations period for filing a petition is tolled pending proper notice to the petitioner's representative (*Matter of Hyatt Equities, LLC*).

J. Upon review of the documents submitted I find there is an issue of fact regarding petitioner's receipt of the subject notice (petitioner's denial of such receipt by affidavit dated February 12, 2009 notwithstanding) as well as the date of petitioner's representatives' receipt of a copy of the notice. Accordingly, this matter should proceed to hearing to resolve these jurisdictional issues.

K. The Notice of Intent to Dismiss Petition, dated January 26, 2009, is withdrawn. The Division of Taxation will have 75 days from the date of this order to file its answer in this matter.

DATED: Troy, New York  
April 30, 2009

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE